

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.1706 OF 2007

Shri Rohan Prabhakar Bachhewar : Appellant

versus

Smt.Khatunbibi Abdul Rajjak

Patel : Respondent

Mr.Atulkumar B. Deshkar for Appellant.

Mr.R.L.Salvi for Respondent No.1.

Mr.C.M.Lokesh i/by Mr.G.S.Hegde for Respondent
No.2.

CORAM : J.N.PATEL &

A.A.SAYED, JJ.

DATED : OCTOBER 23, 2007.

P.C.

1. Heard learned counsel for the parties.
This Court at the outset made it clear to the parties that this appeal will be disposed of at the stage of admission itself to enable them to complete their pleadings in the matter and as the

impugned order in the appeal relates to rejection of plaint on the ground that the relief of specific performance sought for by the plaintiff in respect of plot Nos.178 and 199 cannot be granted as no cause action arise and, the trial Court rejected the plaint under Order VII Rule 11(a) of the Code of Civil Procedure.

2. The Appellant/Plaintiff filed this suit against the Respondent/Defendant for specific performance of contract in the Court of Civil Judge, Senior Division, Panvel. After the suit reached at the stage of framing of Issues, the Respondent/Defendant filed an application under Order VII Rule 11 of the Code of Civil Procedure which was marked as Exhibit-34 and claimed that the plaint deserves to be rejected as the Agreement dated 30.7.2004, on the basis of which the Plaintiff has filed his suit, is in respect of 12.5% plots out of the acquired properties from Talaje Pachnand having Survey Nos.6, 6, 16, 98, 81, 229; whereas in the suit, the plots are mentioned by describing them as Plot Nos.178 and 199 situated at Owe, Sector-30, which do not form part and parcel of the Agreement dated 30-7-2004 on the basis of which the present suit is filed

for seeking specific performance of contract. Further the suit plots are not allotted to the Respondent/Defendant No.1 in lieu of properties mentioned in Para No.1 of the Application (Exhibit 34) which are acquired by Government. Whereas the suit plots are allotted to the Respondent/Defendant No.1 in respect of the properties acquired from village Owe and, therefore, no cause of action arise, in so far as it relates to Suit Plots bearing Nos.178 and 199 situated at Owe, Sector-30, Taluka-Panvel, Dist.Raigad.

3. The Appellant/Plaintiff has filed his reply to the Application. It is submitted by the Appellant/Plaintiff that application deserves to be rejected as the suit does disclose cause of action and is filed on the basis of Agreement dated 30.7.2004 executed by the Respondent/Defendant in favour of the Appellant/Plaintiff which clearly records that the plots which are situated at Owe to be allotted to the Respondent/Defendant. So, in fact what the plaintiff agreed to purchase under the said Agreement is the plots of Owe and it is the Respondent/Defendant who has misrepresented

to the Plaintiff that the said plots are to be allotted against the properties of the Defendant acquired at Taloje by the State Government for New Bombay Development Project and, this being an issue in the suit, that will have to be decided after giving an opportunity to the parties to lead evidence in the matter and the Court cannot reject the plaint by dismissing the claim of the plaintiff at threshold. Further during pendency of the proceedings, even a temporary injunction has been granted in favour of the plaintiff in respect of the suit property.

4. The learned counsel appearing for the Appellant/Plaintiff submitted that a bare reading of the agreement of sale, which is the basis for seeking specific performance of contract, makes it clear that the plaintiff does have cause of action for being tried and, therefore, the Court, at the initial stage, without giving an opportunity to the parties, could not have rejected the plaint.

5. It is contended by the learned counsel for the Appellant/Plaintiff that the impugned order, therefore, deserves to be quashed and set

aside. In support of his case, the Appellant/Plaintiff has placed reliance on the decision of the Supreme Court rendered in the case of **State of Orissa v. Klockner and Company and others** reported in AIR 1996 SC 2140 and **Mayar (H.K.) Ltd. and others v. Owners & Parties, Vessel M.V. Fortune Express and others**, reported in (2006) 3 SCC 100.

6. It is further submitted by the learned counsel for the Appellant/Plaintiff that in all probability the trial Court was influenced by the fact that the High Court, while disposing off Civil Application No.1062 of 2005, had made observations in respect of the suit property that it has not been properly described by specifying the same and, therefore, the trial court found that the agreement for sale entered into between the parties did not contain the suit property on the basis which the specific performance is sought for and it is nothing but an misconception as the plaintiff would be able to establish his case that the plaintiff proposed to purchase the suit property by leading appropriate evidence. It is further submitted that the Respondent/Defendant has admitted of having

received the amount of consideration of Rs.2,30,000/- and, therefore, it was not proper on the part of the learned trial Court to reject the plaint of the plaintiff without giving opportunity to prove their case.

7. On behalf of the Respondent/Defendant, it is submitted that the order passed by the trial Court does not call for any interference as the learned trial Court has come to a correct finding that the suit property does not find description in the agreement of sale entered into between the parties and, therefore, the suit property mentioned in the plaint does not disclose any cause of action and the bare reading of the agreement of sale is enough to dislodge the plaintiff's claim and, therefore, the impugned order does not call for any interference.

8. It is a trite law that maintainability of a plaint, in so far as it relates to cause of action is concerned, is a mixed question of facts and law. Under Order VII Rule 11 of the Code of Civil Procedure, the Court has jurisdiction to reject the plaint on various counts as specified under Order VII Rule 11 of the Code of Civil

Procedure, which relates to rejection of plaint.
Order VII Rule 11 of the Code of Civil Procedure
provides as under :-

"Rejection of plaint -- The plaint shall
be rejected in the following cases --

. (a) where it does not disclose a
cause of action;

. (b) where the relief claimed is
under-valued, and the plaintiff, on being
required by the Court to so correct the valuation
within a time to be fixed by the Court, fails to
do so;

. (c) where the relief claimed is
properly valued, but the plaint is written upon
paper insufficiently stamped, and the plaintiff,
on being required by the Court to supply the
requisite stamp-paper within a time to be fixed
by the Court, fails to do so;

. (d) where the suit appears from the
statement in the plaint to be barred by any law;

. (e) where it is not filed in duplicate;

. (f) where the plaintiff fails to comply with the provisions of rule 9.

9. A cause of action is a bundle of facts which are required to be pleaded and proved for the purpose of obtaining relief claimed in the suit. For the aforementioned purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings rely on any misrepresentation, fraud, breach of trust, willful default or undue influence.

10. Whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found from reading the plaint itself. For the said purpose, the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if the averments made in the plaint are taken to be correct in their entirety, a decree could be passed, for

ascertaining whether the plaint shows a cause of action, the court is not required to make an elaborate enquiry into doubtful or complicated questions of law or fact. By the statute the jurisdiction of the court is restricted to ascertaining whether on the allegations a cause of action is shown. So long as the claim discloses some cause of action or raises some questions fit to be decided by the Judge, the mere fact that the case is weak and not likely to succeed is no ground for shirking it out. The purported failure of the pleadings to disclose a cause of action is distinct from absence of full particulars.

11. In the instant case, Appellant/Plaintiff has sought a decree for specific performance of the contract and injunction based on an agreement of sale dated 30th July 2004 entered between the parties. The plaint contains description of immovable properties agreed to be sold by the defendant to the plaintiff for which defendant has also received part consideration which is duly acknowledged and admitted by the Respondent/Defendant.

12. In the application for grant of Temporary Injunction the defendants came up with the plea that the plaintiff cannot seek specific performance of the property as claimed in the plaint as the defendants are ignorant of the contents of the agreement and further in the agreement of sale there is no description of the plots of land bearing 178 and 199 in Sector No.30 of Mouje Owe. The trial Court granted Temporary Injunction by its order dated 22.7.2005 passed below Exhibit 5. The High Court in C.A.No.1062 of 2005 in A.O. 909 of 2005 vacated the order by observing "The agreement thus did not, prima facie, cover the land allotted to the defendant by CIDCO vide letter dated 24.6.2003". It is on the basis of this order, the Respondent/Defendant filed the application under Order VII Rule 11(a) of Code of Civil Procedure which lead to the passing of the impugned order.

13. In so far as cases in which a plea is taken that the plaint does not disclose a cause of action are concerned, it is a formal rejection of a plaint and for that the court should be able to arrive at a conclusion that the plaint does not disclose a clear right to sue and the court

should exercise its power under Order VII Rule 11 of the Code of Civil Procedure by taking care to see that the grounds mentioned therein are fulfilled. In catena of decisions, the Supreme Court has held that when the plaint discloses no cause of action, it is obligatory upon the Courts to reject the plaint as whole under Order VII Rule 11 of the Code of Civil Procedure but rule does not justify rejection of plaint or any particular portion of a claim in a case where it does make out a triable issue and is a mixed question of facts and law and, therefore, considering the facts of the present case, what this Court finds is that the Respondent/Defendant had tried to take advantage of the fact that in the agreement of sale there was omission as regards description of the suit property which by itself does not dis-entitle the Appellant/Plaintiff for prosecuting his case. As such description given in the plaint which stems out from the agreement of sale between the parties can be always well explained in the evidence and the real intention of the parties can then be gathered by the Court. It is not the case of the Respondent/Defendants that no property was owned by them or was likely to be

made available against acquisition by the Government which could have been conveyed by way of sale and the Respondent/Defendants, after having entered into an agreement of sale and after having received part of consideration, at least, defendants cannot be heard on the ground that the plaint deserves to be rejected for want of disclosure of cause of action i.e. mis-description of the suit property or non-description of suit property in the agreement of sale of which specific performance is sought.

14. Therefore, in the facts and circumstances of the case, the impugned order cannot be sustained in law. Therefore, we are inclined to allow the appeal and quash and set aside the impugned order and restore the suit on the file of the trial Court with directions to proceed with the case in accordance with law. The appeal is allowed with costs. Civil Application does not survive. It is disposed of.

[A.A.SAYED, J]

[J.N.PATEL, J]